

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1298

United States of America,

Plaintiff - Appellee,

v.

Edmundo R. Rosales,

Defendant - Appellant.

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Appeal from the United States
District Court for the Western
District of Missouri.

[UNPUBLISHED]

Submitted: October 18, 2004
Filed: November 2, 2004

Before MURPHY, HEANEY, and BEAM, Circuit Judges.

PER CURIAM.

Edmundo Rosales pled guilty to one count of conspiracy to distribute cocaine. The district court¹ found him responsible for 12 kilograms of cocaine and 365 pounds of marijuana with a base offense level of 32, and it sentenced him to serve 121 months. Rosales appeals, arguing that the drug quantity was incorrectly determined and that he should have received a base offense level of 26. We affirm the judgment.

¹The Honorable Dean Whipple, Chief Judge, United States District Court for the Western District of Missouri.

Rosales was charged with two counts of conspiracy to distribute cocaine. He entered into a plea agreement under which he agreed to plead guilty to the first count, and the government agreed in turn to dismiss the second count. The parties also reached agreement on some sentencing aspects. They agreed that the amount of cocaine for which Rosales was responsible was at least 500 grams and that his base offense level was at least 26. They also anticipated that Rosales would receive a three level reduction for acceptance of responsibility. He failed to appear on the date set for sentencing, however, and consequently lost credit for acceptance and received a two level enhancement for obstruction of justice. In the plea agreement Rosales also made a detailed waiver of his right to appeal his sentence.

In his plea agreement, Rosales "expressly waive[d] the right to appeal his sentence, directly or collaterally, on any ground except for an upward departure by the sentencing judge, a sentence in excess of the statutory maximum, or a sentence in violation of law apart from the Sentencing Guidelines." This waiver was far reaching, and Rosales also "agree[d] not to appeal or otherwise challenge the constitutionality or legality of the Sentencing Guidelines." Rosales nevertheless now seeks to argue on appeal that the district court erred in its sentencing findings and its application of the guidelines.

Rosales claims that the evidence connecting him to 11 kilograms of cocaine and 360 pounds of marijuana was unreliable and that those amounts should not have been attributed to him. By his calculation, he should have been found responsible for less than two kilograms of cocaine, for a base offense level of 26, and his sentencing range should have been 63-78 months. Since his appeal does not challenge any upward departure, a sentence above the statutory maximum, or a nonguideline error, we conclude it is covered by the waiver in his plea agreement.

When a defendant enters a waiver of appeal knowingly and voluntarily as Rosales concedes he did, the waiver will be enforced absent a miscarriage of justice.

United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003) (en banc). Rosales argues that the sentence he received is a miscarriage of justice because the district court's finding of drug quantity rested on "flimsy" evidence. We have recognized that the miscarriage of justice exception is "extremely narrow" and designed to correct sentences not authorized by the judgment of conviction or outside the statutory range. Id. at 892. There is no indication that a miscarriage of justice occurred in this case from the district court's weighing of the evidence presented at the sentencing hearing or its calculation of the amount of drugs for which Rosales was responsible.

The judgment of the district court is affirmed, but our mandate will not issue until after the Supreme Court releases its opinions in United States v. Booker and United States v. Fanfan.² See Administrative Order Regarding Blakely Cases dated September 27, 2004. Counsel's request to withdraw at this time is therefore denied.

²Rosales moved to file a supplemental brief addressing Blakely v. Washington, 124 S. Ct. 2531 (2004), contending that his Sixth Amendment rights were violated by the district court's finding of drug quantity, but our administrative order provides that supplemental briefing will not be considered until after the Supreme Court acts.